From 'piracy' to payment: Audio-visual copyright and teaching practice

Peter Anderson,
Griffith University

It is now very much a commonplace to remark on the ubiquity of television; 'television is a somewhat difficult object, unstable, all over the place, tending derisively to escape anything we can say about it'(Heath 1990 p.267). However, despite this apparent difficulty of placing limits on what can be said about television, there are certainly limits to what can be done with material broadcast on televison. For, no matter how much televison may seem to have become the property of us all, we do not have a right to record and replay broadcasts when ever, or where ever we wish. Material broadcast on radio and television, despite its free entry into the homes and daily lives of a majority of Australians, is governed by the *Copyright Act*; it is a form of property over which viewers actually have very few rights.

This article will provide an account of the changing circumstances governing the use of broadcast television and radio material within the context of education. It will trace the shift from the uncertain and difficult circumstances of the early eighties, to the current management of copyright audio-visual material under the statutory licensing agreement between universities and the Audio-visual Copyright Society (AVCS). In examining the process of debate and legal change over the last decade, we can note a complex rearrangement of the relations between academics, university administrations, copyright owners and the law, as well as some significant shifts in the management of audio-visual teaching and research materials.

Throughout the eighties there was substantial debate, and a degree of confusion, over the use of copyright audio-visual material (including television and radio broadcasts) in the context of primary, secondary and tertiary education. During this period a significant investment was made in video recording and play-back equipment, enabling a far greater use of broadcast audio-visual material than had occurred previously. However, the legality of recording and replaying 'off-air' material was far from certain, with the *Copyright Act* being subject to a string of conflicting interpretations by bureaucrats, government agencies and audio-visual producers, as well as educators themselves. Faced with the daunting task of seeking permission from individual rights owners, and a strong sense that the educational use of such material was in the public interest and thus a form of 'fair dealing', teachers in both schools and universities found themselves engaged (often quite systematically) in practices which fell outside the letter of the law. As early as 1981, the film and television industry was claiming losses of $10 million a year, primarily as a result of "off-air" copying of films in educational institutions'(Durie 1981 p.3).

In 1982 the Attorney-General's Department undertook a *Review of Audio Visual Copyright Law*. Submissions to this review give some indication of the positions of the various interest groups which the law would eventually need to mediate. A detailed account of a number of key submissions can be found in Anderson (1989). In essence, the *Review* provided an opportunity for a re-run of the standard copyright 'debate' that sets the economic monopoly interests of owners against the public interest in free access to knowledge (Whale & Phillips 1983 p.26). For example, The Australian Screen Studies Association argued that a 'critcal knowledge' of the media is important and 'without the access provided by off air recordings, no detailed study of televison would be possible'(Anderson 1989 p.25). In opposition to such positions, the Television Programme Distributors Association of Australia not only argued against the general use of video recorders for time shift purposes (they were concemed that viewers would edit out advertising), but also lobbied against the introduction of 'fair dealing' provisions for researchers and scholars in relation to television and radio. Although the Televison Programme Distributors accepted that a licensing scheme for televison would solve some of the problems of educators, they wanted to limit recording to 'broadcasts intended to be used for educational purposes'(Anderson 1989 p.26). While submissions to this *Review* assisted in clarifying the various conflicting interests in the area, no immediate solution was forthcoming.

Four years later, in response to Opposition proposals for amendments to the Copyright Amendment Bill 1986, the Senate Standing Committee on Education and the Arts produced a more focussed report on the matter, *Audio-visual copying by educational institutions*. In addition to rejecting the Opposition amendment, which would have made it possible for educational institutions to freely copy programmes owned by the ABC or SBS, the Report recommended that the Attorney-General's Department should 'develop its proposal for a statutory licensing scheme for the educational copying of audio-visual material'(p.xv). The proposal for a statutory licence offered a solution in line with what might be seen as a 'trend' towards the collective administration of copyright, with either voluntary or statutory licences managed by copyright-collecting societies being seen as 'standard practice in all industrialised nations' (McVicar 1992 p.2). The collection of royalties for the photocopying of copyright works by educational institutions was already managed by such a system, with licensing agreements between educational institutions and the Copyright Agency Limited.

In November 1988, the Copyright Amendment Bill 1988, which included a scheme for the management of educational copying of audio-visual material under a statutory licence, among almost half a dozen significant proposed changes to the *Copyright Act*, was finally put before the Parliament. In addition to the amendments concerning the educational use of audio-visual materials, the Bill also introduced elements dealing with a blank (audio) tape royalty scheme, limited protection of performers' rights, and revisions to the mechanisms for regulating photocopying in educational institutions. It also sought to clarify certain overlaps between the Copyright and Designs Acts. After substantial debate, and the introduction of some significant amendments by the Senate (existing 'fair-dealing' provisions in relation to audio-visual materials - criticism and review, reporting of news - were extended to include the use of materials 'for the purposes of research or study'), the Bill was eventually passed in May 1989.

The amended *Copyright Act* provided a framework for the establishment of a single copyright collecting society, to manage a statutory licensing scheme covering the educational use of broadcast audio-visual material. In 1990 the AVCS was formed to administer the rights of copyright owners, and by July of that year had formulated guidelines for the copying of radio and television material by educational institutions. Most universities and colleges signed a 'Collectinn Scheme Agreement' based on full record-keeping. The new scheme introduced a simplified process for ensuring that the use of audio-visual material in educational institutions was legal, with the AVCS going so far as to offer indemnity against copyright infringement actions in relation to material that had been recorded illegally during the previous six years. However, for those who had become used to working outside the law, the introduction of record keeping and the need to pay for material that had once been freely acquired through 'piracy', may well have appeared to be a step backwards. The new arrangements were quickly agreed to by universities, but the process of developing administrative structures within each institution, and ensuring that all staff complied with the new arrangements, seems to have been a more complex and time consuming process.

It is possible to outline the general structure of the collecting system agreed to by the universities; however, short of surveying every tertiary institution in the country, it is very difficult to indicate how the new system works 'on the ground'. The agreements between the AVCS and schools operate on the payment of a set 'per-head' fee, and so only those schools occasionally involved in surveys are required to keep comprehensive records (to determine what is being copied, so that the funds collected can be distributed). The situation in universities is quite different, with payment being based on detailed records of exactly what is copied, with the added complexity of three different categories of television material, as well as radio (for a detailed account of the scheme see Anderson (1991/92)). Importantly, because the agreement is between each university and the AVCS, teaching staff may only make copies under the agreement if they are authorised to do so by their institution. Thus the way each institution organises its internal management of audio-visual materials will determine the impact the scheme has on the work practices of individual academics.

While many academics may once have taken responsibility for the recording and 'management' of a significant proportion of the television and radio material used in their teaching, under the new statutory licence the situation is clearly quite different. The responsibility for the administration of the system lies with the university, which must now pay for the use of broadcast audio-visual material that may previously have been 'pirated' by individual staff at no significant cost to the institution, or individual departments. In addition to the payment of fees for the use of copyright material, universities also have to bear the cost of administering the record keeping and fee calculation. In some instances, there may also have been a need to significantly restructure the general management of audio-visual resources, to cope with the shift from the 'private' management of teaching resources by individual academics, to 'collective' management by the institution.

A further problem for the effective management of audio-visual resources within universities is produced by the awkward intersection of the statutory licence and the fair dealing provisions introduced into the *Copyright Act* during debate on the 1988 Amendment Bill. Significantly, they cover a wider range of subject matter than the statutory licence, allowing academics and students to make copies of both broadcast and published audio-visual material for research and study purposes. However, unlike the reasonably explicit limits that have been determined in relation to 'fair dealing' with printed texts, the *Act* provides only general guidelines for determining what is 'fair' in relation to dealings with audio-visual materials (Anderson 1991/92 p.34).

The fair dealing provisions are clearly of great value to researchers, but they do open up the possibility of confusion between teaching materials and research materials. If a copy of any audio-visual material is made as a fair dealing copy, it can not be used for teaching. Showing such material to a class, even once, will negate its 'fair dealing' status, and breach both the *Copyright Act* and the agreement with the AVCS. Clearly, this introduces a significant tension between the collective management of teaching resources and 'private' research materials, for if there is a possibility that audio-visual research material may be used for teaching at some point in the future, then it will need to be treated as teaching material right from the start. Therefore, the same material has a different legal status depending on the use to which it is put.

Despite the lengthy debate which preceded the introduction of the statutory licence, there appears to have been little, if any, detailed research into the use of broadcast material in the teaching context. Even now, after two full years of operation under the stautory licence, there is still very little publicly available information on the impact of the scheme. Initial estimates by the AVCS, suggesting that between $2 million and $3 million would be collected from all educational institutions (West 1990 p.17), have been borne out. However, in the university sector the amounts paid by individual institutions are not generally available. Indicative (unpublished) figures, provided by the AVCC, reveal that in 1992 some institutions paid as little as $150, while others copied over $30,000 worth of radio and television material. While no percentage breakdown of the amounts copied in each category is available, figures such as these suggest that copying each year by individual universities might fluctuate between an hour or two, to a couple of full weeks of recording.

Due to the low level of publicly available information, it is difficult to determine just how effectively the new scheme is functioning within the university system. If there is a 'debate' over the issues raised by the changes introduced by the scheme, it has remained within the network of exchanges governed by the internal management of university resources. However, whatever the official position of individual universities, or the AVCC, the AVCS appears less than satisfied with the current arrangements. In a letter sent to universities early this year, the Chief Executive of the AVCS, Susan Bridge, indicated that the operation of the Collection Scheme Agreements with universities is currently under review, citing both criticism from within universities, and the Society's own concern 'that many universities are not complying fully and completely with their obligations', as reasons for the dissatisfaction with the current arrangements. In addition to implying that there is a significant level of under-reporting, the AVCS suggests that 'few universities have procedures in place that would appear to be adequate for the proper administration of the agreements'(Bridge 1993 p.2).

As an alternative to the current record keeping system, the AVCS is offering a shift to a sampling system, similar to that employed within the school system. Late last year the AVCS approached the AVCC with a proposal for the introduction of a sampling scheme in 1993, at an overall cost of around $1.50 per EFTSU. While the AVCC declined to either recommend the scheme to its members, or negotiate over the offer, the AVCS has 'decided to leave the offer open to any university that wishes to move from a record-keeping agreement to a sampling agreement'(Bridge 1993 p.3).

However, while universities remain within the current record-keeping agreements, they can anticipate increased monitoring of compliance, and 'where evidence is obtained of the failure of a University to report all relevant copying the AVCS will pursue the legal avenues open to it under the agreements and the Copyright Act on behalf of its members'(Bridge 1993 p.4). Two main methods are employed to monitor the use of audio-visual materials; student audits of broadcast material used in teaching, and statutory inspections of tapes and records. The implications of this increased scrutiny of the use of audio-visual materials are significant, not just for the institution, but for the individual academics who use such material in their teaching. The failure of an individual member of staff to conform to the requirements of the record-keeping scheme will not only put the institution at risk, but will also expose that teacher to possible legal action for breach of copyright.

In the shift from the unregulated 'piracy' of the early eighties, to the current system of collective mangement of broadcast audio-visual subject matter, two major changes can be identified. Firstly, whatever the complexities and costs of the new scheme, it *has* made it possible for academics to more readily gain access to broadcast televison and radio material for teaching purposes, and remain within the law. But what the new arrangements have also done, is to introduce mechanisms that allow copyright owners to more effectively protect their property from unauthorised appropriation. Far from 'escaping us' in

some uncontrolled and unstable proliferation, broadcast television and radio falls firmly within an explicit legal and regulatory framework which both permits educational access to it, and defines obligations for users of it. While academics who used broadcast audio-visual materials in their teaching may once have found themselves cast in the 'resistant' role of 'pirates', for the current system to work they need to recast themselves as intellectual property resource managers.

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Competitive research grants and industry collaboration: A challenge for universities in the 1990s

Peter Johnson

Assistant Registrar (Research Administration), The University of Western Australia

Introduction

Many researchers within universities are undertaking collaborative research with industry for the first time in their careers. They are finding it difficult to come to terms with the pressures of working in a commercial environment. This article traces the reasons why universities and industry are collaborating more than ever before. It focuses on the competitive research grants schemes which have been established by government over the past decade, and especially on the research and development (R & D) corporations in the primary industries and energy sector. How well have universities and industry responded to the opportunities provided under these schemes? What are some of the problems? Have the various parties reached an understanding on issues such as the ownership and valuation of intellectual property, the right to publish and the importance of research milestones, etc? These and other issues are covered and some suggestions offered on what needs to be done in relation to both policy and attitudes in this area.

Responding to the challenge

Why are universities and industry collaborating in research more than ever before? A major reason is that government has made a concerted effort in recent years to encourage collaborative research between universities and industry. Initiatives such as the 150% tax incentive for research and development, the Generic Technology Grants Scheme, the establishment of R & D corporations in the primary industries and energy sector, the National Teaching Company scheme, the Cooperative Research Centres program, Australian Postgraduate Research Awards (Industry) and the Australian Research Council Collaborative Research Grants scheme have been developed to boost R & D expenditure. Most if not all of these schemes are administered and funded under the auspices of government departments or corporations (the 'funding agency'). They require formal links between researchers and commercial collaborators, including financial commitments by industry to the R & D, in cash or in kind. Government expects the results of the R & D to be exploited on normal commercial terms and to the benefit of the Australian economy.

On another front, the Government has also been taking steps to improve the intellectual property system. Various forms of protecting intellectual property have been recognised, including amendments to the Copyright Act in 1984 and the passage of the Plant Variety Rights Act in 1987. The Australian Technology Group (ATG) has also recently been established 'to provide the range of services required to translate Australian research and technology into products and services which can be delivered to the Australian and international markets on a totally commercial basis'[1].

How are universities responding? Some have been quicker than others to adapt to the new environment, where the term 'intellectual property' is now more fashionable than a decade ago. In those days, many believed that intellectual property with commercial significance was most likely to arise through serendipity, as a result of staff or students undertaking research primarily resourced by the university. Thus, the principal issues of concern were often whether to patent the discovery and how the inventor and the university might share in the proceeds from commercial exploitation. Issues such as the rights of funding agencies and other third parties to intellectual property were not commonly considered.

Initially, some universities responded to the new environment by establishing university companies to develop and manage links between the tertiary sector, industry and government. Such companies have had mixed success, with many relying on income from consulting activities to maintain a satisfactory cash flow, rather than on royalties from the exploitation of intellectual property. They are not well suited, however, to processing proposals and grants arising out of the industry-focussed competitive research grants schemes which have been introduced in recent years. Many of these schemes require a number of stages for each proposal. A preliminary proposal is usually around 2 - 3 pages in length, with sufficient information to enable a funding agency to decide whether to call for a full proposal. If a full proposal is submitted and is successful, further negotiations are often required to match the budget and research milestones, etc to the amount offered. Negotiations concerning a formal agreement between the funding agency and the university also take place at this point. Finally, many such agreements require the university and the commercial collaborator to enter into a further contract covering matters such as intellectual property.

A growing number of universities are now appointing legally trained research contracts officers, attached in many cases to their research grants offices, to assist with the negotiation of these matters and to draft and review research agreements. Many universities have also sought the assistance of the Australian Vice-Chancellors' Committee (AVCC). As a result of all of this activity, the level of awareness of the various issues relating to collaborative research with commercial potential has risen considerably within universities.

There are some universities, however, which are still reluctant to commit additional resources to the commercial aspects of research, either because they do not recognise the scope of work involved or are not convinced that income from commercially-oriented research ventures will justify the extra cost. Some fail to recognise that intellectual property matters often have less to do with generating significant income than with protecting the interests of parties to a contract where there may be a commercial return in the long term. Universities which neglect their contractual responsibilities may save money in the short term, but they expose themselves to the possibility of being sued for breach of contract if, for example, confidential information arising from a collaborative research project is disclosed without the prior approval of the funding agency.

Adjusting to change

The relationship between funding agencies requiring collaboration